DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
941 North Capitol Street, NE, Suite 9100
Washington, DC 20002

K.P. Appellant/Claimant, v. W-A Appellee/Employer.	Case No.: ES-P-08-109541

FINAL ORDER

I. INTRODUCTION

This is an appeal by Claimant K.P. of a Claims Examiner's Determination certified as served February 15, 2008, holding Claimant ineligible for benefits. Claimant filed his appeal on February 19, 2008. The appeal raises the issue whether Claimant was discharged for cause constituting "misconduct" rendering him ineligible for benefits (for a period of time), as specified in the District of Columbia Unemployment Compensation Act (D.C. Code, 2001 Ed. § 51-110(b)) and 7 District of Columbia Municipal Regulations ("DCMR") 312.

This administrative court issued a Scheduling Order and Notice of In-Person Hearing on February 26, 2008, scheduling the hearing for March 11, 2008. Claimant appeared and represented himself at the hearing. Appellee/Employer W-A was represented by Michael G., Esq. R.B., Superintendent, attended the hearing for Employer as well. At the start of the hearing, Claimant moved for a continuance, because he was not prepared to go forward. As a result of Claimant's motion, I realized that this administrative court had mailed the Scheduling Order to Claimant at the address on the Claims Examiner's Determination, which was wrong

(Claimant's apartment number was listed as #310, when it was actually #301). Claimant never received the Scheduling Order, and only learned of the hearing because he happened to call this administrative court on March 10, 2008. For good cause shown, I granted Claimant's motion and continued the hearing to March 28, 2008, at 10:30 a.m. Claimant appeared and represented himself at the March 28, 2008, hearing. Claimant testified during the hearing. Mr. G., Esq., appeared on behalf of W-A; however, Mr. B. did not attend the hearing. I admitted Claimant's exhibits 100-102 and Employer's 200-202 into evidence, and I relied on court records marked for identification purposes as exhibits 300 and 301 to determine jurisdiction.[1]

II. FINDINGS OF FACT

1. The Claims Examiner's Determination was mailed to the parties on February 15, 2008. Exhibit 300. Claimant was found ineligible. On February 19, 2008, Claimant appealed the Determination.[2] Exhibit 301.

2. Employer is the local public transportation agency. Claimant worked for Employer from December 2004 until January 11, 2008, as a Bus Operator.

3. On October 12, 2004, Claimant applied for a job with Employer at a job fair held at Pentagon City Mall in Virginia. Exhibit 200. There were hundreds of applicants at the job fair and Employer's staff was very busy assisting all of the applicants. It was hard for Claimant to

[1] During the hearing, I stated an intention to require W-A to file a complete copy of the employment application (exhibit 200) utilized by Claimant, as exhibit 200 has certain redactions. However, at the conclusion of the hearing I forgot to order W-A to file the application. Given my conclusions herein, Claimant is not prejudiced by my oversight.

[2] Nothing in the record below indicates any issue has been raised or preserved concerning factors under D.C. Code, 2001 Ed. § 51-109; *e.g.*, base period eligibility, availability for work.

obtain individualized assistance during the job fair. When Claimant filled in his employment application, he answered "no" to each of the following questions:

> 4. Have you ever been convicted of any offense other than a traffic violation? If yes, please explain (a conviction does not automatically disqualify you from employment. Criminal convictions are not an absolute bar to employment, but will be considered with respect to the specific requirements of the job for which you are applying.
>
> 5. What is minimum annual salary you will accept?
>
> 6. Indicate source from which you learned of this position?

Exhibit 200. The application includes a "Certification and Authorization" section before the signature block that indicates that the applicant has read the application and that the information provided is accurate. Exhibit 200. The Certification and Authorization also notes that if the application contains misrepresentations or omissions, the applicant will be fired, even if the omission is discovered after the applicant begins employment with W-A. Exhibit 200. Finally, the Certification and Authorization authorizes W-A to conduct a background investigation of all applicants. Exhibit 200.

4. On July 8, 1991, Claimant was convicted of a Class A sex offense – attempted rape. Exhibit 201. In late 2005, Claimant moved from Montgomery County, Maryland to Washington, DC in order to live with his girlfriend. Claimant did not inform his probation officer that he had moved from Montgomery County. On November 23, 2005, Claimant registered with the Metropolitan Police Department as a sex offender. Exhibit 201.

5. In early 2006, Claimant's supervisor at W-A, A.D., told Claimant that the Montgomery County police had a warrant for Claimant's arrest. At this time, Mr. D.'s deputy was R.B. Mr. D. told Claimant to turn himself in to the police or face potential arrest. With Mr. D.'s permission, Claimant left work and turned himself into the Montgomery County police.

Claimant appeared before a Montgomery County court officer and learned that the reason for issuance of the warrant was Claimant's failure to tell his probation officer that he was moving to Washington, DC. Claimant was released that day and he returned to work immediately to explain the situation to Mr. D.

6. During the conversation with Mr. D., Claimant acknowledged his earlier conviction for attempted rape and explained the circumstances of his conviction and current status. Mr. D. accepted the explanation and took no adverse personnel action against Claimant.

7. On January 11, 2008, a regular passenger on Claimant's bus reported that he harassed her at her place of employment. Exhibit 100. Claimant was placed on administrative leave. Claimant denied the allegation and alleged that the complainant was angry that he (Claimant) had rejected her request for a relationship. Exhibit 100. Metro Transit Police Department investigated the allegation and determined that there was insufficient evidence to support a harassment complaint. Exhibit 100. During the course of its investigation, the Transit Police found Claimant's criminal record. Claimant's new supervisor, Mr. B., decided to terminate Claimant.

8. On January 24, 2008, during a meeting with Claimant, Mr. B. explained why he had decided to terminate Claimant. Mr. B. stated that his decision was based on the allegation of harassment leveled by a bus passenger and Claimant's failure to acknowledge that he had a 1991 conviction when he applied for a job with W-A in 2004. Exhibit 202.

III. DISCUSSION AND CONCLUSIONS OF LAW

In accordance with D.C. Code, 2001 Ed. § 51-111(b), any party may file an appeal from a Claims Examiner's Determination within ten calendar days after the mailing of the determination to the party's last-known address or, in the absence of such mailing, within ten calendar days of actual delivery of the determination. The Determination in this case contains a certificate of service dated February 15, 2008, and Claimant filed his appeal on February 19, 2008. The appeal was timely filed and jurisdiction is established. D.C. Code, 2001 Ed. § 51-111(b).

Generally, any unemployed individual who meets certain statutory eligibility requirements is qualified to receive benefits. D.C. Code, 2001 Ed. § 51-109. The law, however, creates disqualification exceptions to the general rule of eligibility. If an employee is discharged for misconduct, the employee is disqualified from receiving benefits for a period of time. D.C. Code, 2001 Ed. § 51-110(b). The initial burden is on the employer to establish an exception for an employee who would otherwise be eligible for unemployment insurance benefits under D.C. Code, 2001 Ed. § 51-109; in other words, to show that the employee committed an act which would constitute misconduct (gross or otherwise). 7 DCMR 312.2 (burden of production on party alleging misconduct); *McCaskill v. D.C. Dep't of Employment Servs.,* 572 A.2d 443, 446 (D.C. 1990).

The governing regulations (7 DCMR 312) define "gross misconduct" as:

> an act which deliberately or willfully violates the employer's rules, deliberately or willfully threatens or violates the employer's interests, shows a repeated disregard for the employee's obligation to the employer, or disregards standards of behavior which an employer has a right to expect of its employee.

The regulations specifically enumerate "dishonesty[,]" as an act constituting gross misconduct. 7 DCMR 312.4(e).

The regulations also define conduct that is "other than gross misconduct" ("simple misconduct") as:

> An act or omission by an employee which constitutes a breach of the employee's duties or obligations to the employer, a breach of the employment agreement or contract, or which adversely affects a material employer interest. The term 'other than gross misconduct' shall include those acts where the severity, degree, or other mitigating circumstances do not support a finding of gross misconduct.

7 DCMR 312.5.

Additionally, under decisions of the District of Columbia Court of Appeals, when more than one reason is given for an employee's discharge, this administrative court must first determine whether the reasons operated independently or in the aggregate to prompt an employer's dismissal decision

> When [more than one] reason[ ] for discharge [is] presented by an employer, the appeals examiner must make a finding as to whether those reasons were independent or whether they each contributed toward a "critical mass" that ultimately resulted in the employee's discharge. *See* *Smithsonian Inst. v. District of Columbia Dep't of Employment Servs.*, 514 A.2d 1191, 1194 (D.C. 1986) (quoting *Jones v. District of Columbia Unemployment Compensation Bd.*, 395 A.2d 392, 396-97 (D.C. 1978)).

Harker v. D.C. Dep't of Employment Servs., 712 A. 2d 1026, 1029 (D.C. 1998). Where the reasons are independent, an employee may be disqualified from receiving unemployment benefits if the employer proves that any one of those reasons constitutes misconduct. Where the reasons constitute a mutually dependent "critical mass," an employee will be disqualified for misconduct only if the employer proves all the reasons given constitute misconduct. *See Smithsonian Inst. v. D.C. Dep't of Employment Servs*., 514 A.2d 1191, 1192 (D.C. 1986) (where employer gave four "mutually dependant" reasons for employee's firing, "all four had to be

proven" to show a misconduct disqualification). In this case, the record shows that Employer's decision to discharge Claimant was made only after the harassment allegation was received on January 11, 2008. In other words, Employer chose not to terminate Claimant after learning of his criminal record, so until the harassment allegation was received, Employer did not believe Claimant's action warranted termination. Claimant may therefore be disqualified from receiving unemployment benefits only if it is proven by a preponderance of evidence that each of the incidents in question constitutes misconduct.

As detailed below, I conclude that Employer failed to prove by a preponderance of evidence that Claimant actually harassed a female bus passenger at her place of employment. The Metro Transit Police Department report indicates there is "insufficient evidence to support a harassment complaint." Exhibit 100. Employer presented no other evidence to support its case. Mr. B., who appeared for the first hearing, but not the rescheduled hearing, could have testified on this crucial point - if he chose to attend the hearing. Further, Claimant credibly testified that the complainant was mad at him for spurning her overtures. Herein lies the problem, because Employer failed to present any evidence other than the Metro Transit Police Department report and the testimony of Claimant, I cannot determine whether Claimant's actions constitute misconduct. As Employer has the burden of proof, I have no alternative than to conclude Employer has failed to satisfy this burden. 7 DCMR 312.2 (burden of production on party alleging misconduct); *McCaskill v. D.C. Dep't of Employment Servs.,* 572 A.2d 443, 446 (D.C. 1990).

If Mr. B. had appeared to testify, he also could have responded to Claimant's contention that he (Claimant) had explained his criminal conviction in detail to Mr. D. At the time of the conversation between Claimant and Mr. D., Mr. B. was Mr. D.'s deputy. However,

as Mr. B. did not testify and Claimant credibly testified that he told Mr. D. of his past conviction in early 2006, it is reasonable to conclude that Mr. D. decided to overlook the fact that Claimant had a criminal conviction and did not acknowledge this on his application.[3] Additionally, Employer has authority to conduct background checks on all applicants and Employer presented no evidence on the question of whether it conducted such a check on Claimant, or, may be as a result of limited resources, was unable to conduct such a check, or something entirely different. The point is that by failing to bring any witnesses to the hearing, Employer failed to prove its case.

In drawing this conclusion, this administrative court is cognizant of the underlying purpose of the unemployment statute. The D.C. Court of Appeals has noted that "[t]he purpose of the District's unemployment compensation statute is to protect employees against economic dependency caused by temporary unemployment and to reduce the need for other welfare programs." *Cruz v. D.C. Dep't of Employment Servs.*, 633 A.2d 66, 69 (D.C. 1993) (internal citations omitted). As a result of this purpose, courts have determined that unemployment compensation statutes "should be liberally construed to achieve the benign purposes intended to the full extent thereof." *Butler v. Rutledge*, 329 S.E.2d 118, 123 (WV 1985).

IV. ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is, this 4th day of April 2008

[3] Claimant argued that his "no" answer to the question regarding his criminal record was an inadvertent oversight, grounded in the fact that the job fair was chaotic. Given Claimant's "no" response to the questions immediately following the question concerning his criminal record (*see* Finding of Fact no.3), I believe Claimant.

ORDERED that the Determination of the Claims Examiner that Appellant/Claimant K.P. is ineligible for unemployment benefits is **REVERSED**; it is further

ORDERED that Appellant/Claimant K.P. is **ELIGIBLE** for unemployment compensation benefits; it is further

ORDERED that the appeal rights of any person aggrieved by this Order are stated below.

April 4, 2008

/SS/
Jesse P. Goode
Administrative Law Judge